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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, QUAKER BAKING COMPANY, CORPORATIONS, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED, APPELLANTS (PLAINTIFFS),

VS.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA, APPELLEES (DEFENDANTS).

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF APPELLEES

PAUL F. GOOD,
DANIEL STUBBS,
Counsel for Appellees.

STATEMENT OF THE CASE

The statement of the case made by appellants in their brief is, in the main, correct, but is subject to the following additions and changes in emphasis.

This case was commenced on July 23, 1931, by the filing of appellants' petition, ten days *before* the Act assailed as unconstitutional became a law and effective as such on August 2, 1931 (Appellants' brief, p. 4). A temporary restraining order was entered restraining the defendants from operating under the Act on July 23, 1931 (R., p. 1). Subsequent orders were superseded [Original record (not printed), Vol. I, p. 91, and Vol. II, p. 107] so that the Act has never been operative.

The rules of the Deputy Secretary of Agriculture adopted on September 19, 1931 (R., p. 28), were the rules considered by the trial court (R., p. 38) and the Supreme Court of Nebraska (R., p. 46).

In addition to the provisions in the rules of the Secretary of Agriculture of September 19, 1931, set out in appellants' brief (R., p. 28) it is also provided in said rules that the baker shall not be responsible for the maintenance of the minimum weight after delivery of the bread (R., p. 29).

SUMMARY OF ARGUMENT

I.

In prescribing standard weights for loaves of bread the fixing of a maximum limit of weight or excess tolerance for each standard weight prescribed is useful and necessary and bears a reasonable relation to the purposes of the Act and is not an arbitrary or capricious exercise of the police power.

a. The regulation of standard weights of bread to prevent short weight frauds and unfair competition is a reasonable exercise of the police power.

Schmidinger v. *Chicago*, 226 U. S. 578, 57 L. Ed. 364.

Armour & Co. v. *North Dakota*, 240 U. S. 510, 60 L. Ed. 771.

b. The scope of judicial inquiry in examining the question of the validity of a provision of a state law, the purpose of which is concededly a valid subject for police regulation, is limited to determining whether the legislature could reasonably have believed that the provision bears a reasonable relation to the purposes of the law.

Lochner v. *New York*, 198 U. S. 45, 49 L. Ed. 937.

Schmidinger v. *Chicago*, 226 U. S. 578, 587, 57 L. Ed. 364, 368.

c. In order to fix a standard weight it is necessary to place minimum and maximum limits upon that weight. If weights of a commodity may deviate from the standard either up or down in an unlimited amount no standard has been fixed. If no standard weight is fixed which necessarily included the limitation of a maximum weight, the act is deprived of all force to prevent weight frauds which concededly the state has power to prevent.

Armour & Co. v. *North Dakota*, 240 U. S. 510, 60 L. Ed. 771.

d. The court cannot say that the legislature of Nebraska had no reasonable grounds to believe that a maximum weight limit is essential and bears a reasonable relation to the fixing of standard weights and the prevention of weight frauds when it considers:

1. That this court has sustained such a maximum weight limit.

Armour & Co. v. *North Dakota*, 240 U. S. 510, 60 L. Ed. 771.

2. That the state supreme courts have sustained such a maximum weight limit.

State v. *Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867.
Ex Parte Fujii, 189 Calif. 55, 207 Pac. 537.
Mobile v. *Yuille*, 3 Ala. 137, 36 Am. Dec. 441.
Com. v. *McArthur*, 152 Mass. 522, 25 N. E. 836.
Stegmann v. *Weeke*, 279 Mo. 140, 214 S. W. 137.

3. Numerous other legislatures have enacted provisions similar to the Nebraska Act.

4. The trend of contemporary thought and literature support the view, and this should be considered.

Muller v. *Oregon*, 208 U. S. 412, 419, 420, 52 L. Ed. 551, 554, 555.

5. The testimony of experts sustains the view.

6. Logical reasoning reaches the same conclusion.

e. The case of *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 68 L. Ed. 813, does not support a contrary view, and if interpreted to do so, should be, in so far as it does, disapproved.

II.

Even though the court should hold that the maximum weight limit feature of the Act is invalid, the

remaining provisions of the Act should not be held void for that reason.

Whether the whole Act falls because one provision is invalid depends upon whether that provision is separable from the remainder of the Act.

Dorchy v. *Kansas,* 264 U. S. 286, 290, 68 L. Ed. 686, 690.

The determination of this question is primarily for the state court, but this court having acquired jurisdiction may decide it in the absence of a ruling in the state court or it may remand it for determination by the state court.

Dorchy v. *Kansas, supra.*

Legal effect may be given to the act though the maximum weight limit be eliminated.

Schmidinger v. *Chicago,* 226 U. S. 578, 57 L. Ed. 364.

The question may be determined upon the face of the act in Nebraska.

McShane v. *Douglas County,* 96 Neb. 664, 667, 148 N. W. 569, 570.

State v. *Painter,* 117 Neb. 42, 46, 219 N. W. 794, 796.

Such an act has been held separable.

Wonder Bakeries Co. v. *White,* (D. C. Ia.) 3 F. S. 311, 313.

If the provision for a maximum weight limit is held void the court should either (1) hold the remainder of the Act

separable therefrom or (2) remand the case for a determination of that question by the State Court.

III.

The delegation of authority to the Secretary of Agriculture to prescribe administrative details in the enforcement of the instant act does not violate the fourteenth amendment.

That the authority given to the Secretary of Agriculture is a proper delegation of power under the state constitution is settled by the opinion below.

Petersen Baking Co. v. *Bryan,* (R. p. 48), 124 Neb. 464, 467-8, 247 N. W. 39, 41.

That it is a reasonable delegation under the due process clause of the federal constitution is settled by a long line of decisions in this court.

Buttfield v. *Stranahan,* 192 U. S. 420, 48 L. Ed. 525.

U. S. v. *Grimaud,* 220 U. S. 506, 55 L. Ed. 563.

Union Bridge Co. v. *U. S.,* 204 U. S. 364, 51 L. Ed. 364.

St. Louis, Iron Mountain & Southern Ry. Co. v. *Taylor,* 210 U. S. 281, 52 L. Ed. 1001.

Louisville & N. R. Co. v. *Garrett,* 231 U. S. 298, 305, 58 L. Ed. 229, 239.

Red "C" Oil Manuf. Co. v. *North Carolina,* 222 U. S. 380, 394.

IV.

The provisions of the statute and the rules and regulations are plain and definite and do not subject appellants to unreasonable standards. Objections to the rules of the Secretary of Agriculture will not be considered in view of the failure of appellants to apply to the administrative board for a modification of the rules.

a. Neither the statute nor the rules of the Secretary of Agriculture subject appellants to responsibility for the weight of bread after it has left their possession for the rules provide that responsibility ceases after delivery. (R. p. 29). It will not be presumed that the discretion authorized by the statute will be unreasonably exercised by the public officer charged with administration of the act.

New York v. *Van De Carr*, 199 U. S. 552, 560, 50 L. Ed. 305, 310.

The objection that the statute does not fix a time during which the maximum limit must be maintained is without merit, for bread does not increase in size after it is baked.

b. Objections to the rules adopted by the Secretary of Agriculture are not before the court in view of the failure of appellants to request modification of said rules of the administrative officer prior to commencing suit.

Red "C" Oil Mfg. Co. v. *North Carolina*, 222 U. S. 380.

But if the court examines the rules,

(1) the term "fancy breads" is a well defined trade term and is so held by the trial court (R. p. 39).

(2) The authorization of the Secretary of Agriculture to make "reasonable tolerances" is a definite delegation of discretion, and that it is a proper one is shown under Point 3 of our brief. The rules fix a tolerance of 3 ounces to the pound which is rather definite. Appellants object to this as being too definite.

(3) All other terms used in the act when given their plain and ordinary meaning have a definite and clear connotation and appellants are not misled by them.

(4) If the rules are held subject to examination, and are held void for indefiniteness, the statute should still be held valid.

Dorchy v. *Kansas, supra.*

V.

The statute and the rules of the Secretary of Agriculture prescribe standards with which the appellants may reasonably comply.

a. The objection that the weight limitations of 3 ounces to the pound are impossible of compliance is directed to the rules of the Secretary of Agriculture who prescribed the limitation (R., p. 29). The court will not consider objections to the rules in view of the failure of appellants to first request modification of the same of the administrative officer.

Red "C" Oil Mfg. Co. v. *North Carolina, supra.*

Petersen Baking Co. v. *Bryan*, 124 Neb. 464, 247 N. W. 39.

b. If the court should hold that the rules may be examined there is ample evidence to support the finding of the trial judge (R., p. 38) that appellants may reasonably comply with the weight limitations in the conduct of their business, and that finding should not be disturbed.

c. If the court should find that the rules should be examined and should hold that they prescribe impossible standards, only the rules should be held void and the statute should be held valid.

Dorchy v. *Kansas, supra.*

VI.

The business of the appellants is held on such reasonable conditions as may be imposed by the governing power of the state; and the fact that a reasonable exercise of the police power results in restrictions of appellants' business and imposes some inconveniences upon them does not render the law invalid.

The purpose of the act is to secure for the benefit of the public a system of honest weights and measures. If an act reasonably effectual for that purpose results in restrictions of appellants' business, the restrictions are merely a valid exercise of police regulations.

Mugler v. *Kansas,* 123 U. S. 623, 31 L. Ed. 205.

Walls v. *Midland Carbon Co.*, 254 U. S. 300, 65 L. Ed. 276.

Erie R. Co. v. *Williams*, 233 U. S. 685, 58 L. Ed. 1155.

Northwestern Laundry v. *Des Moines*, 239 U. S. 486, 60 L. Ed. 396.

L'Hote v. *New Orleans*, 177 U. S. 587, 44 L. Ed. 899.

Crowley v. *Christensen*, 137 U. S. 86, 34 L. Ed. 620.
Schmidinger v. *Chicago, supra.*
Armour & Co. v. *North Dakota, supra.*

The objection that appellants must replace some of their equipment with new sizes and that they will be forbidden to bake a loaf of bread previously baked have been foreclosed by the cases of *Schmidinger* v. *Chicago, supra*, and *Armour & Co.* v. *North Dakota, supra.*

Appellants do not acquire a prescriptive right under the constitution to conduct their business in a manner susceptible of fraudulent practices.

ARGUMENT

Point I.

In prescribing standard weights for loaves of bread the fixing of a maximum limit of weight or excess tolerance for each standard weight prescribed is useful and necessary and bears a reasonable relation to the purposes of the Act and is not an arbitrary or capricious exercise of the police power.

It is not denied by appellants and has become almost axiomatic that it is well within the power of the legislature of Nebraska to prescribe standard weights and measures in regulating business dealing with commodities in general use and that such regulation may extend to the business of baking bread. *Schmidinger* v. *Chicago*, 226 U. S. 578, 57 L. Ed. 364 (1913). *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 60 L. Ed. 771 (1916). The purpose of such legislation is "to protect buyers from short weights and honest bakers from unfair competition." Brandeis, J.,

dissenting in *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 517, 68 L. Ed. 813, 828.

The Nebraska Act of 1931, challenged by appellants and set out in full on pages 3-4 of their brief prescribes definite standard weights for loaves of bread made for sale in the State of Nebraska and prohibits the making of any other size loaf for sale in said state. Because of the infirmity existing in the art of baking bread making it impossible to maintain a definite fixed weight in a loaf of bread after it is baked the Act permits a tolerance differing from the standard weight. This is accomplished by fixing a maximum and minimum weight for each standard weight. The minimum weight is fixed at the standard weight. The size of the tolerance from the standard weight permitted and the time during which the minimum weight must be maintained (it is obvious that a loaf of bread does not increase in weight after baking) is left to be prescribed as an administrative detail by the Secretary of the Department of Agriculture.

The first and principal objection to the Act urged by appellants is directed to the maximum weight limit prescribed. Point I of Appellants' Brief (p. 15) urges that to prescribe a maximum tolerance is in and of itself a violation of the fourteenth amendment regardless of whether compliance with such tolerance is possible and reasonable.

When a state law is so clearly inappropriate to the purposes sought to be attained and the relation it bears to those purposes is so arbitrary as to "shock the conscience" of the court it will not be sustained. But business and personal "liberty" may not be freed from all restrictions. *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937.

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be * * * are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and *unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.*" (Italics ours.)

Schmidinger v. *Chicago*, 226 U. S. 578, 587.

The validity of the Nebraska Act in the premises must therefore be sustained unless the court can say that the legislature of Nebraska cannot reasonably have had in mind any relation between a maximum weight limit and the evils which the standard weight law was designed to prevent.

The question is not whether the court finds the law necessary but rather is whether the court can say that the law is so apparently unnecessary that no reasonable mind could differ.

The purposes of the Act are the same as all standard weight acts, to prevent short weight frauds and unfair competition. The principal object is to prevent the imposition of short weights on the undiscerning public consumer. No one denies that this is a laudable purpose.

The reason that standard weight laws prevent short weight frauds is not obscure. Articles of general con-

sumption not sold in bulk weight may be prepared for sale in an infinite number of weights. The difference in size of two containers of lard, one weighing 14 oz., the other 18 oz., is not readily distinguishable by the average consumer. The two containers look the same to him. There is no standard by which he can and will readily determine whether he is getting his money's worth. It is probably true that said consumer never learns that he has been deceived. The business of the fraudulent company depends upon keeping the consumer deceived.

If, on the other hand, a standard weight is fixed for lard and it may be sold in a container of only one pound net weight, the purchaser is certain of the amount he receives and has a standard upon which to base a selection.

The purchaser, in short, has "a means of estimating his purchase free from disguise or the necessity of an arithmetical estimate of what he is getting or paying for * * * *." *Armour & Co.* v. *N. D.*, 240 U. S. 510, 516.

The limitation of the sale of commodities to defined standard weights and measures has been held valid by state courts,

Stegmann v. *Weeke*, 279 Mo. 140, 214 S. W. 137.
State v. *McCool*, 83 Kans. 429, 111 Pac. 477.
People v. *Wagner*, 86 Mich. 594, 49 N. W. 609.
Com. v. *McArthur*, 152 Mass. 522, 25 N. E. 836.
State v. *Co-operative Store Company*, 123 Tenn. 399, 131 S. W. 867.
Ex Parte Fujii, 189 Cal. 55, 207 Pac. 537.
Allion v. *Toledo*, 99 Oh. St. 416, 124 N. E. 237.
State v. *Moore*, 104 N. C. 714, 10 S. E. 143.

See cases in note to *Burns Baking Co.* v. *Bryan*, 68 L. Ed. 814.

and by this court,

Armour & Co. v. *N. D., supra.*

Now, it would seem to be clear that a standard weight necessitates both a minimum and a maximum weight. If a maximum *only* of three pounds weight is fixed for a commodity, it is clear that the commodity may be sold in an infinite number of weights from zero to three pounds and no STANDARD WEIGHT has been fixed. This is as apparently true of an act fixing a *minimum limit* only. It follows irresistibly that a maximum is a necessary incident to prescribing a *standard weight.*

The fixing of standard weights has been uniformly held to be a reasonable means to effect a prevention of short weight frauds. See cases *supra.*

Can it be said that a maximum limit, a limit which is necessary to fix a standard weight, so obviously bears no relation to the purposes of a standard weight law that the legislature of Nebraska acted in an arbitrary and capricious manner?

The North Dakota Act sustained in *Armour & Co.* v. *North Dakota, supra,* fixed a maximum limit. The North Dakota Act provided that lard, not sold in bulk, should be put up in containers holding one, three, or five pounds net weight and whole multiples thereof AND NOT ANY FRACTIONS THEREOF. 240 U. S. 510, 511.

The only difference between the North Dakota Act and the one at bar is that lard is a commodity susceptible of

exact weight control and bread is not. The Nebraska legislature recognized this and provided a tolerance so that it would be possible to adapt the principles of standard weight acts to bread without prescribing weights with which compliance would be impossible.

When the Act of North Dakota prescribes that lard shall be sold at one pound or three pounds when sold in a container, a sale of a container holding one pound one ounce is illegal. *The reason is that the act prescribes a maximum of one pound for the standard weight of one pound.* The provisions of that act were held to be valid and not an arbitrary exercise of the state's police power in *Armour & Co.* v. *North Dakota, supra.*

What difference is there between prescribing that lard may not be sold in a container of over 1 pound net weight and bread may not be sold in a loaf of over 19 oz. net weight?

Can the court now say that the maximum weight limit cannot reasonably bear any relation to the purposes of the Nebraska Act?

Is not the relation of the maximum weight limit to the prevention of weight frauds as close as the relation of the prohibition of waiver of warranty to the prevention of selling threshers and combines unfit for the purpose for which sold?

Advance Rumely Thresher Co. v. *Jackson*, 287 U. S. 283, 77 L. Ed. 306.

Both tend to prevent manufacturers from deceiving the public who are unable to form a competent judgment on first inspections.

State laws fixing standard weights or measures and prohibiting the sale of commodities in other than the prescribed standards have been sustained by many state courts. The following fixed a MAXIMUM as well as a minimum limit and prohibited sales of weights in excess of the MAXIMUM. *State* v. *Co-operative Store Co.,* 123 Tenn. 399, 131 S. W. 867 (fixing standard weight of bushel of corn meal at 48 pounds and prohibiting sales in bags or other containers except those containing 2, 1, ⅓, ¼, or 1/8 bushel by weight). *Ex Parte Fujii,* 189 Calif. 55, 207 Pac. 537 (fixing standard berry basket of a dry pint and dry ½ pint and a standard strawberry basket of one dry pint), *Mobile* v. *Yuille,* 3 Ala. 137, 36 Am .Dec. 441 (prescribing the weight of bread on a graduated scale), *Com.* v. *McArthur,* 152 Mass. 522, 25 N. E. 836 (requiring bread to be sold in whole, half, three-quarter or one-quarter loaves), *Stegmann* v. *Weeke,* 279 Mo. 140, 214 S. W. 137, 5 A. L. R. 1061, (1919), (fixing the shape and cubic contents of bushel and half-bushel measures and forbidding the sale of certain produce in other than the prescribed measures). And see related cases in note to *Burns Baking Co.* v. *Bryan,* 68 L. Ed. 813, 814, and annotations 5 A. L. R. 1068.

In these acts where a sale in any weight other than the prescribed standard weight is prohibited, the act created a MAXIMUM weight limit.

These cases represent the almost uniform holding of all state courts to whom the question has been presented. (See one case to the contrary, *Buffalo* v. *Collins Baking Co.,* 39 App. Div. 432, 57 N. Y. Supp. 347.)

These cases and the opinions therein (written by presumably reasonable judges) are submitted not as of judi-

cial influence on the constitutional question, but to show that others than the legislature of Nebraska have believed that the maximum weight limit in Standard Weight Laws bore a reasonable relation to the purposes of the Act.

Can this court now say that the legislature of Nebraska had no reasonable grounds upon which to base a belief that the maximum weight limit was a necessary part of the standard weight bread law?

Numerous other legislatures have enacted provisions similar to the Nebraska Act. Iowa, 1927 Laws, Chapt. 62; Ohio, 1921 Laws, p. 604 (very similar to instant statute except the permitted tolerance is much less). Indiana, Burns Ann. Stat. Supp. 1921, Chapt. 81, p. 1117 (same); Wisconsin, Laws 1923, Chapt. 123, p. 227; Chicago City Ordinance, August, 1921, Section 188; Texas, Sec. 719 (1921); California, Stats. and Amendments, 1921, Ch. 704, p. 1196; South Dakota, Laws 1921, Ch. 239, as amended by Laws 1923, p. 174; North Dakota, Laws, 1923, p. 289; Montana, Rev. Code 1921, Vol. 1, Pol. Code, Part 3, p. 1547. Oregon, Laws 1919, Chapt. 82, Sec. 1. Connecticut, Laws 1921, Chapt. 261, Sec. 2, 3, 4. Washington, Laws 1923, Chapt. 126, Sec. 1. Arizona (1925), sec. 4, 5, Chapt. 13, Laws 1925. Minnesota (1927), sec. 1-4, Chapt. 351, Laws 1927.

An examination discloses that twelve of these fourteen acts provide for a maximum tolerance. In four of them the tolerance is fixed by an administrative officer.

A comprehensive survey of the field of thought upon the subject and the attitude of the Federal government during the war as exemplified by the rules promulgated Feb. 1, 1918, by the United States Food Administrator, "Series D" under authority of the Lever Act (August 10, 1917,

Chapt. 43, 40 Stat. at L. 276), the attitude of the Annual Conference of Weights and Measures as shown by their reports, the attitude of a number of state legislatures and state officers, and of a number of committees investigating the subject, is made and the authorities collected in the opinion of Mr. Justice Brandeis (dissenting opinion in *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 519-534, 68 L. Ed. 813, 829-836).

Although our position does not require us to support the proposition that a maximum weight limit is absolutely necessary to sustain the act and justify an affirmance, we believe that a careful consideration of the authorities and arguments therein collected will lead to the conclusion that a regulation of maximum weight limits is essential to prevent weight frauds in loaves of bread as in any other commodity.

The *Revised Rules and Regulations Governing Licensees Manufacturing Bakery Products* of the United States Food Administrator effective Febr. 1, 1918, referred to in the second next preceding paragraph fixed MAXIMUM LIMITS for each standard weight therein prescribed of 1 pound, 1½ pounds, and multiples of a pound. A maximum variation of 1 ounce per pound over each weight and 1 ounce per pound under each weight was permitted. (Rule 2, Class 1, *Special Rules and Regulations Governing Licensees Manufacturing Bakery Products*, United States Food Administrator, Series D, Febr. 1, 1918.)

For the reason for the rules see United States Food Administration, Bulletin No. 11, December 1917, p. 3:

> "A multitude of sizes—there are now not less than 38 different sizes on the market, all the way from 6

> ounces to 4 pounds—is to be reduced to 3 or 4. The standard weight is a protection to the buyer. *Among 38 sizes and ever so many varieties, it is hard for any one to tell which is the best value.* But when there is a standard 1-pound loaf, one can choose on the basis of *price* and *good baking.*" (Italics ours.)

And see in 1933, "Information for the Press," Sept. 25, 1933, U. S. Department of Agriculture, Adjustment Administration, Washington, D. C., p. 2 (extract from letter of consumers' counsel of the Agricultural Adjustment administration),

> "There has been a great deal of confusion and misunderstanding about bread prices during the past two or three months, because of this lack of standards. This applies also to a lack of uniformity in weights. Many bakers have made changes in weight."

H. R. 8981, The Federal Bread Bill introduced but not yet passed by Congress fixes a maximum weight limit for each standard size.

The annual conference of weights and measures has continuously urged and supported a maximum tolerance for standard weights of bread. *Fifteenth Annual Conference on Weights and Measures*, 1922, p. 88, "Reason for Standard Weight Loaves of Bread," John M. Mote, after calling attention to the fact that three variables are involved in calculating the worth of a loaf of bread, and that loaves if baked in any number of different sizes, result in confusion even though labeled, p. 90,

> "It would really be necessary, under these circumstances, if a housewife desired to compare carefully two loaves of bread of different weights to compute the price per pound or per ounce, for each loaf before

she could proceed with her comparison. It is obvious that such a comparison is entirely impracticable * * * * * *."

See remarks of C. J. Kremer representing Retail Bakers' Association of America, *16th Annual Conference on Weights and Measures*, Dept. of Commerce Publication, 1923, pp. 104-111. And see pp. 116-118, Indorsement of a *Model Bread Law* therein set forth *which fixes standard weights of loaves and provides for tolerances to be fixed by the administrative officer.*

And see *17th Annual Conference of Weights and Measures*, 1924, Dept. of Commerce Publication, pp. 40-47, Enforcement of the Indiana Bread Law, by I. L. Miller. The law fixes a maximum weight limit. *18th Conference on Weights and Measures*, 1925, pp. 163-169, Dept. of Commerce Publication, *Report of the Committee on Specifications and Tolerances on Tolerances for Bread.*

The court has taken judicial notice and considered like information upon a question of similar purport. *Muller* v. *Oregon*, 208 U. S. 412, 419, 420, 52 L. Ed. 551, 554, 555.

This material is offered to show the trend of thought of those giving the subject consideration. It shows clearly that the legislature of Nebraska had reasonable grounds upon which to base a belief that the maximum weight limit was useful and, indeed, necessary, to adequately effect the purpose of a standard weight law. It shows that the act of the legislature was not an arbitrary or capricious exercise of the police power.

We submit and earnestly urge that it shows that a court with complete information as to the facts and theory of

standard weight laws must reach the conclusion that the excess tolerance of the instant Nebraska Act bears a reasonable relation to the purpose of the act, concededly a valid subject of legislation, and must therefore be sustained.

The evidence in the record sustains these conclusions. Mr. O. P. Skaggs, who does a large retail marketing business as well as a baking business, testified that it was impossible for the average consumer to compare weights while buying the bread (R., p. 189). He testified that the 12 oz. loaf baked by his bakeries was the same size as the 16 oz. loaf (R., p. 189).

The problem of selecting bread with no standard weight imposed is influenced by three variables, weight, quality, and price. To adequately compare two loaves of bread with the weight uncontrolled requires an extensive mathematical computation, *Armour & Co.* v. *North Dakota, supra,* which a large number of consumers, probably the great majority, are unable to make, and the remaining few will not take the time and trouble. This is the situation which unscrupulous bakers may turn to their advantage. (See testimony of O. P. Skaggs, R., p. 188.)

The testimony of James Nelson Tracy, an officer charged with enforcing the Ohio bread law, testified to the abuses and deceptive practices engaged in by bakers (R., p. 254). A baker labeled a loaf at 16 oz., and then sold it in a 20 oz. size, the purpose being to lead the public to believe that he was delivering 4 oz. overweight. Appellants ask (as they do throughout their brief) how this practice is harmful. The answer is that the *price* the baker received was the same as other bakers received for a *24 ounce* loaf. Such a practice would be prevented if all loaves must conform to a standard weight.

The fallacy of the argument that if a consumer asks for a pound loaf of bread and receives one weighing 20 ounces he is not injured thereby is that it does not reflect the evils that the act attempts to remedy and is based on a false premise.

Consumers do not ask for *a pound loaf* of bread. They only ask for a *loaf of bread*. The unsuspecting public does not enter a store full of suspicions about the weight of bread. If there are two makes of bread selling at ten cents, one weighing 21 ounces and the other weighing 24 ounces, which look about the same size, the consumer is unable to ascertain from appearances which one will be nearest to giving him his money's worth.

If it is true that a 20 ounce loaf, when sold as a 16 ounce loaf does no injury (and this may not be true depending on the price) then it is equally true that the transaction is fraudulent and injury results if the purchaser believes he is getting a 24 ounce loaf.

As long as the baker may make any size loaf from 16 oz. up that he desires no standard is fixed, and the situation leaves the doors open for fraudulent practioners to deceive the public purchaser. A maximum weight limit is essential to any regulation of standard weights that tends to prevent such frauds.

Appellants principally rely upon the case of *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 68 L. Ed. 813. We submit that the case was decided upon the ground that it was impossible for bakers to comply with the tolerance deviation permitted by the act considered in that case. The case is supportable upon that ground. It was not

necessary to determine the validity of a maximum tolerance in a standard weight law in that case.

We are aware that the last paragraph of the opinion in the *Burns Baking Co. case* contains language to the effect that a maximum weight limit is not necessary to the enforcement of a standard weight law, and is therefore arbitrary and invalid. In view of the arguments, cases and material heretofore referred to in this brief, and especially the case of *Armour & Co.* v. *North Dakota, supra*, decided by this court, we do not believe that the court had an adequate presentation in the *Burns Baking Co. case*, so as fully to inform it as to the facts relative to the maximum tolerance feature and the necessary connection it has with a standard weight law.

We believe that this information and the authorities presented merit further consideration of the language referred to in the *Burns Baking Company case*.

The language in that case to which we referred serves now as a bar to the successful operation and enforcement of laws to protect the consuming public from *weight frauds*. The remainder of the cases cited by appellants upon this point in lower federal and state courts serve only as illustrations of this fact. (Appellants' Brief, pp. 21-23, citing *Holsum Baking Co.* v. *Greene*, 45 Fed. (2nd) 238; *Quaker Baking Co.* v. *Herring*, 3 Fed. Suppl. 118; *Wonder Bakeries Co.* v. *White*, 3 Fed. Suppl. 311; *State* v. *Curran*, 220 Ala. 4-6, 124 So. 909, 912.) An examination of these cases will disclose that none of them purport to arrive at the conclusion that maximum weight limits are invalid because of any independent investigation of the court. The courts in these cases do not purport to agree with the conclusion, but only hold that they are bound by the language used in the *Burns Baking Co. case*.

These cases prove no more than adherence to the language referred to in the *Burns Baking Co. case.* Nothing is proved by mere reiteration.

Why should the court repeatedly hold that the prevention of weight frauds in commodities of general use is a valid subject of legislation by the states and deny the use of an incidental power necessary to the exercise of the principal power?

We respectfully suggest that in questions of this nature, the court should bear in mind the words of Mr. Justice **Brandeis:**

> "Such limitation of principles previously announced, and such express disapproval of dicta, are often necessary. It is an unavoidable incident of the search by courts of last resort for the true rule. The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."
>
> *Washington* v. *Dawson & Co.*, 264 U. S. 219, 236, 68 L. Ed. 646, 565.

We respectfully submit that in the light of the material presented herewith the *Burns Baking Co. case, supra,* in so far as it may be interpreted to prohibit the fixing of maximum weight limits should be disapproved. And we earnestly urge that there can be no reasonable doubt that the legislature of Nebraska in passing the instant law did not act in an arbitrary or capricious manner but reasonably believed that the maximum weight limit was necessary and bore a reasonable relation to the purpose of the standard weight bread law.

Point II.

Even though the court should hold that the maximum weight limit feature of the Act is invalid, the remaining provisions of the Act should not be held void for that reason.

Because one provision in an act is bad it does not follow that the whole act of which it forms a part must fall. The test is whether the invalid part is separable from the remainder.

> "It cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."
>
> *Dorchy* v. *Kansas*, 264 U. S. 286, 290, 68 L. Ed. 686, 690.

The determination of this question is primarily for the State court. If the highest state court has not passed upon the question this court may do so, *Dorchy* v. *Kansas*, *supra*, or it may remand the case to the state court for its determination, *Dorchy* v. *Kansas*, *supra*.

If the provision fixing a maximum weight limit is eliminated from the act, its provisions are in substance like those in the Chicago ordinance sustained in *Schmidinger* v. *Chicago*, 226 U. S. 578, 584-5; 57 L. Ed. 364, 366-7. Legal effect may be given to it. *Schmidinger* v. *Chicago*, *supra*.

Whether the legislature would probably have passed the remainder of the act without the maximum weight limit may be determined from the face of the act. *McShane* v.

Douglas County, 96 Neb. 664, 667, 148 N. W. 569, 570; *State* v. *Painter*, 117 Neb. 42, 46, 219 N. W. 794, 796.

The minimum weight limit feature of a standard weight bread law was separated and held valid after the maximum weight limit was held invalid because of the language in the *Burns Baking Co. case, supra*, referred to on page 23 of this brief (we submit, erroneously) on the ground that it would be unreasonable to hold that the legislature would not have enacted the former provision in the absence of the latter.

Wonder Bakeries Co. v. *White*, (D. C. Ia.) 3 F. S. 311, 313.

We submit that if the court holds the maximum weight limit provision void, it should either hold that the remainder of the act is separable and valid or remand the case to the Supreme Court of Nebraska for its determination of the issue.

Point III.

The delegation of authority to the Secretary of Agriculture to prescribe administrative details in the enforcement of the instant act does not violate the fourteenth amendment.

That the authority given to the Secretary of Agriculture in the instant act was a proper delegation to a proper officer under the state constitution is settled by the opinion of the Supreme Court of Nebraska in this case below. *Petersen Baking Co.* v. *Bryan*, (R., p. 48) 124 Neb. 464, 467-8, 247 N. W. 39, 41.

The only question before this court is the reasonableness of the delegation under the due process clause. *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U. S. 380, 56 L. Ed. 240.

The actual rules adopted bear no relation to this question and are therefore not discussed under this point.

Section 2 of the Act, Chap. 162, Laws, Neb. 1931, p. 430 (R., p. 24), fixes standard weights for loaves of bread. A "primary standard" is thus fixed. Section 3 then provides that the Secretary of Agriculture shall prescribe "reasonable tolerances" in excess of these weights so fixed within which legal loaves may be baked and also shall prescribe the time during which the weights must be maintained.

This simply recognizes that the art of baking bread has not reached the stage where bread may be baked at a definite unchanging weight and that these weights vary with varying atmospheric conditions. The legislature, realizing the need for a tolerance which could be varied in order to be reasonable and to accord with the state of the art authorized the authority charged with the enforcement of the act to fix the tolerances. He may not change the standard weights nor the minimum weight.

As Judge Brewer said in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 875:

> "The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable today, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods, in this state once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of

continual session than if left with one meeting only at stated and long intervals."

This court in a long line of decisions, has held delegations of power far greater than found in the Nebraska act not to violate the due process clause.

Buttfield v. *Stranahan*, 192 U. S. 420, 48 L. Ed. 525. (An act to prevent the importation of impure tea and authorizing the Secretary of the Treasury to fix the *standards of "purity, quality, and fitness"* which might be imported.)

U. S. v. *Grimaud*, 220 U. S. 506, 55 L. Ed. 563. (An act to protect forest reservations authorizing the Secretary of Agriculture to make rules to effect that purpose and making violation of such rules punishable criminally.)

Union Bridge Co. v. *U. S.*, 204 U. S. 364, 51 L. Ed. 364. (An act to prevent the obstruction of navigable rivers and authorizing the Secretary of War to require alterations in bridges necessary to render navigation safe and unobstructed and making non-compliance punishable criminally.)

St. Louis, Iron Mountain & Southern Ry. Co. v. *Taylor*, 210 U. S. 281, 52 L. Ed. 1001. (Safety appliance act authorizing Interstate Commerce Commission to fix the *standard* height of drawbars used in interstate commerce.)

Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298, 305, 58 L. Ed. 229, 239. (An act authorizing the Kentucky Railroad Commission to fix intra state rates.)

Red "C" Oil Manuf. Co. v. *North Carolina*, 222 U. S. 380, 394. (An act to fix standards of safety and value of illuminating oil authorizing the Commissioner of Agriculture to *prescribe the standards* and making violations of the rules of the Commissioner punishable criminally.) (See Sec. 8, Public Laws, North Carolina, 1909, p. 911.)

We submit that the validity of the instant act in the premises follows *a fortiori* from the *Red "C" Oil Manuf. case, supra.* In the *Red "C" Oil Manuf. case*, the commissioner *fixed the standard* and his authority was sustained.

In the instant case the *standards are fixed in the act.* It is apparent that the powers granted by the North Carolina act were far broader than in the Nebraska act.

The legislature has fixed the "primary standards" and if the rules of the Secretary are arbitrary they may be reviewed in the courts.

The cases cited by appellants (Appellants' Brief, p. 27), *King Manuf. Co.* v. *Augusta*, 277 U. S. 100, and *Sultan Ry. Co.* v. *Dept. of Labor*, 277 U. S. 135, hold merely that a city ordinance and an order of a state bureau fall in the classification "statute of the state" and may be reviewed. In so far as they deal with delegation of legislative powers these cases assume that it was properly delegated under the facts in those cases.

Point IV.

The provisions of the statute and the rules and regulations are plain and definite and do not subject appellants to unreasonable standards. Objections to the rules of the Secretary of Agriculture will not be

considered in view of the failure of appellants to apply to the administrative board for a modification of the rules.

We exclude from our submissions under this point the argument that compliance with the act is impossible. We show that it is reasonably possible to comply with the standards prescribed under Point V, page 35 of our brief.

We limit discussion hereunder to the objections (a) that the act imposes on appellants the maintenance of standards after loaves of bread have left their possession and beyond their control and therefore irrespective of their negligence (urged by appellants in point 3, pp. 30-38 of their brief) and (b) that the terms of the act are so indefinite as to be void.

a. Section 2 of the Act prescribed standard weights for loaves of bread. Section 3 provides for a reasonable maximum limit upon these weights to be fixed by the Secretary of Agriculture and also authorizes that officer to prescribe the time within which the minimum weight shall be maintained (R., pp. 24-25). This is a reasonable authorization (cases cited Point III, pp. 26-29, this brief). It cannot be assumed that the administrative officer will adopt unreasonable rules which will impose unreasonable standards upon appellants. *New York* v. *Van De Carr*, 199 U. S. 552, 560, 50 L. Ed. 305, 310.

And the rules adopted are not properly before this court for examination. *Red "C" Oil Manuf. Co.* v. *North Carolina, supra.* The court there held:

> "We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture. The court below was clearly right when it observed that if, as the complainant

> alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the Board of Agriculture to modify them."

This is a reasonable rule tending to reduce litigation.

It is presumed that a public officer will do his duty and if unreasonable rules are adopted the presumption follows from the first that upon proper showing he will modify them. He should be given that opportunity before his acts may be termed arbitrary. Therefore the rule is that the court will not examine the rules if the objections urged have not been first submitted to the administrative officer who then refused to modify the rules. *Red "C" Oil Manuf. Co. v. North Carolina, supra.*

The statute does not impose any unreasonable time limitations for they are to be fixed by the Secretary of Agriculture. The time limits there adopted are not before the court.

But the rules of the department if examined, do not impose limitations upon the appellants after the subject of limitation has passed beyond their control. Rule II provides in part:

> "The baker of such bread, however, shall not be responsible for the maintenance of said minimum weight after delivering the same to a retail dealer or consumer, or to a transportation agency in Nebraska for delivery to a retail dealer or consumer." (R., p. 29.)

In short, the baker is only responsible for the weight of the bread while in his possession. Since the argument

for appellants is that the appellants are responsible for loaves of bread after they have left their possession (Appellants' Brief, p. 35) it is clear that the objection is without merit.

That the rules referred to are within the authority of the Secretary of Agriculture and are the rules in issue is a matter of interpretation and procedure settled in the state court. *Petersen Baking Co.* v. *Bryan*, 124 Neb. 464, 466, 247 N. W. 39, 41. *Schmidinger* v. *Chicago, supra.*

The objection that the statute and the rules do not fix a time during which the maximum limit must be observed has no merit. It is not argued that the evidence or any theory of the art of breadmaking shows that the bread INCREASES in weight after baking. Once the loaf is baked within the maximum weight there is no danger that it will later exceed that weight. A regulation fixing such a time would be useless and absurd.

b. The appellants complain that the statute and the rules and regulations do not fix standards definite enough to inform them to what the act applies. Insofar as such objections are directed to the rules of the Secretary of Agriculture the appellants are precluded from examining them now. *Red "C" Oil Manuf. Co.* v. *North Carolina, supra.*

If the court examines the rules, appellants first object to the exemption in the act of "fancy breads."

We are not as courageous as appellants who submit that the evidence on this point as well as on most others is uncontradicted. That is seldom true in a case of this nature. Appellants, who desire to continue baking bread without any restrictions would find means of justifying in

their own minds that they know not what a "fancy bread" is, and have testified thereto.

We do submit that the evidence is sufficient to sustain the finding of the trial court that the term "fancy bread" has a well defined meaning (R., p. 39). The trial court saw and heard the witnesses. It is not the province of this court to determine a conflict in evidence *de novo*.

Joe Carr, president of the Nebraska Bakers Association (R., p. 305), testified that there is a term in bakers parlance such as fancy bread (R., p. 306); that the term refers to bread in which special ingredients or special labor has been used, such as nut bread, cheese bread, or colored bread (R., p. 306).

Carl Ebner, a baker in Lincoln, Nebraska (R., p. 307), testified that the term "fancy breads" is used in bakers parlance to mean special bread as distinguished from ordinary bread. That the general wholesaler baked mostly ordinary bread (R., pp. 307-308).

In short, the act definitely includes the ordinary breads made of ordinary grain flour and excludes all special breads (Decree of District Court, R., p. 39).

The ordinance of Chicago sustained in *Schmidinger* v. *Chicago*, *supra*, exempted "stale" bread.

Appellants complain that the Secretary of Agriculture must make "reasonable tolerances." The objection that this is indefinite may be made to every act which authorizes rules to be made by an administrative officer as to the details of enforcement of an act and is answered by the cases submitted under Point III, supra, pages 26-29 of our brief.

Appellants do not urge that the tolerance of 3 ounces to the pound fixed by rule is not definite.

Appellants' objection that an overweight loaf is not defined by the act is the same argument worded differently. The answer is that the maximum tolerance fixed by the rules of the Secretary of Agriculture determine what an overweight loaf is. Appellants' objection really is that the authorization is an improper delegation of legislative powers which we examine in Point III, supra, pp. 26 to 29, and show to be without merit.

Appellants protest that the term "made for sale in the State of Nebraska" is indefinite (Appellants' Brief, pp. 46-47). Obviously the legislature did not intend to regulate the baking of bread in other states. We confess that we fail to comprehend how this phrase could be stated more clearly.

Objection is made as to the terms contained in the rules of the Secretary of Agriculture. We submit again, that these rules are not properly before the court due to the failure of appellants to object concerning them to the administrative officer. *Red "C" Oil Manuf. Co. v. North Carolina, supra.*

However, the terms have well defined meanings and would not tend to lead appellants astray. "After cooling" and "under normal conditions" must be given the plain, ordinary meaning of the language used, and it is obvious there is nothing uncertain about them. "Cooling" of bread is also a trade term and the Petersen Baking Co. maintain a cooling room in their factory (R., p. 150).

Furthermore, if the court should hold the rules of the Secretary of Agriculture properly subject to examination, in spite of the *Red "C" Oil Manuf. Co. case, supra,* and should hold them or any part of them so indefinite as to be void, it does not follow that the statute is invalid for that reason, and the statute should be held valid nevertheless. *Dorchy* v. *Kansas, supra.*

Point V.

The statute and the rules of the Secretary of Agriculture prescribe standards with which the appellants may reasonably comply.

Appellants object that the act is arbitrary in that it is impossible to comply with the tolerance of three ounces to the pound. This tolerance is fixed by the rules of the Secretary of Agriculture (R., p. 29), by rules adopted September 19, 1931. They have never been operative as to appellants for they have superseded all orders subsequent to the temporary restraining order. (Original Record [not printed], Vol. I, p. 91, and Vol. II, p. 107.)

The objection is not directed to the statute, but to the rules of the Secretary of Agriculture.

We submit that this court will not consider objections to the said rules in view of the failure of the appellants to submit them to the administrative officer whose duty it is to prescribe them. *Petersen Baking Co.* v. *Bryan*, 124 Neb. 464, 468-9, 247 N. W. 39, 41; *Red "C" Oil Manuf. Co.* v. *North Carolina, supra.*

This is a reasonable rule to prevent unnecessary litigation and based upon the theory that a public officer is pre-

sumed to exercise honest and reasonable discretion. *New York* v. *Van De Carr*, 199 U. S. 552, 560, 50 L. Ed. 305, 310.

It follows that if the rules adopted are unreasonable and the attention of the administrative officer had been directed thereto by objection, it is presumed that he would have changed them.

And the modification of the rules is all that may be accomplished by review by the courts. If they should be held unreasonable restrictions it does not follow that the statute fixing the "primary" standards is void. *Dorchy* v. *Kansas*, *supra*.

We therefore submit, first, that the rules are not properly before this court to permit an examination of them.

Secondly, if the court should hold that the rules may be examined, then we submit that the rules are reasonable and that appellants may comply with them in the reasonable conduct of their business.

The objection is that the appellants are unable to bake a loaf of bread which will weigh 16 oz. or more within twelve hours after the bread has cooled, and not weigh more than 19 oz. immediately after baking. In short, that the 3 oz. tolerance is too small.

A large part of the evidence submitted upon this point was simply an introduction into the evidence of a transcript of the evidence in the *Burns Baking Co. case*, 264 U. S. 504 (R., p. 63), decided in this court April 14, 1924, and tried some time prior to that time, and a transcript of the evidence (R., pp. 167-272) in *Petersen Baking Co.* v. *Weaver*, (Appendix "A", appellants' brief) decided December 30, 1929, and tried some time prior thereto.

There is no evidence in the record nor any offer of proof tending to show that conditions in the art of baking in 1931 were similar to those existing at the time the above evidence was taken. We submit that it is not competent or material proof of the ability of appellants in 1931 to comply with the provisions of the rules.

The deviation from the standard weight held to be unreasonable in the *Burns Baking Co. case, supra*, was 2 ounces, and the minimum limit was required to be maintained for 24 hours, 264 U. S. 504, 510. The rules of the Secretary of Agriculture permit a deviation of 3 ounces and require the minimum to be maintained for only 12 hours or until delivery by the baker if that be earlier (R., p. 28). Obviously the present provisions are much less strict than those considered in the *Burns Baking Co. case, supra*.

We do not say that there is no conflict in the evidence, although there is less than might be expected, but we do insist that there is ample evidence to support the finding of the trial judge that it is not impossible for appellants to comply with the law and that they may do so in the reasonable conduct of their business (Decree of the trial court, R., p. 38).

> "This court finds that under the evidence in this case there can be no question but that such a tolerance, as three ounces, is sufficient and that such a tolerance requirement could readily be complied with by bakers affected."

The various tests made by the plaintiffs (appellants) as well as by defendants disclose that the provision is reasonable and compliance therewith is reasonably possible.

At page 40 of appellants' brief, certain of these tests are set out which they assert show that the tolerance is too small. *We confess that it is not clear to us how appellants derive the figures set out in their brief from the exhibits referred to, and we are content with examining the exhibits.* The first is plaintiffs' Exhibit "D" (R., p. 113). This shows that 12 loaves were scaled at 20½ oz., and baked. Of these 12 loaves only 1 weighed over 19 oz. when baked, the rest weighing between 18½ and 19 oz. The figures were not carried out to show the weights 12 hours after cooling (about 1 hr. and 30 minutes, R., pp. 262, 263), but they show the weights 12 hours after baking. *The lowest is 16¾ oz., which is well above the minimum weight limit of 16 oz.* Thus 11 of the 12 loaves maintained a weight of between 19 oz. and 16 oz. after baking, which is all the law requires. The one loaf was kept in a *moist* room and was under all the most unfavorable conditions. The loss of weight after baking on this loaf was only ¼ oz. LOAF NUMBER 11 HAD THE MAXIMUM LOSS WHICH WAS 1¾ oz. If this exhibit shows anything it shows it is reasonably possible to comply with the law.

And, we submit that an average of any five of these loaves would show a range of variation far less than found in any one loaf.

The appellants in arriving at their conclusion are including one weight variation that is not material. *They include the loss of weight during baking!* (Appellants' Brief, pp. 40, 41.) The law makes no requirement of weight before or during baking. It only requires that a loaf in the standard weight of one pound shall weigh between 19 oz. and 16 oz. *after* baking and for 12 hours after cooling time. The only material loss of weight therefore is that occurring after baking, *and the inclusion of a baking variation is improper and misleading.*

The next table, plaintiffs' exhibit "E" (R., p. 114), shows 12 loaves scaled at 20½ oz. Every loaf weighed 19 oz. or less when taken from the oven and 16 oz. or more 12 hours after baking. The maximum variation after baking is 2½ oz. (R., p. 114). This exhibit is referred to on page 40 of appellants' brief.

Plaintiffs' exhibit "F" (R., p. 115), shows 12 loaves scaled at 20 oz. The maximum variation within 12 hours after taken from the oven is 3 oz., and therefore within the permitted tolerance.

These are single loaves of bread whereas the rules of the Secretary permit averaging the weights of 5 loaves (R., p. 29). It is obvious that the average variation would be less than the maximum.

Next, appellants (Appellants' brief, p. 40) refer to four exhibits (R., pp. 310 and 311). It will be observed that the maximum variation in ALL FOUR TABLES after baked and until 12 hours thereafter, is 2¾ oz. The average of *any 5 loaves would be less*, SINCE THERE ARE ONLY 2 LOAVES OUT OF THE 38 SHOWN THAT REACHED 2¾ oz.

Plaintiffs' exhibit 1931 B-3 (R., p. 312), it will be noticed from the scaling weights and baked weights, *is approaching the standard weight of* 1½ *pounds where the permitted variation is* 4½ *ounces* (R., p. 29). The largest variation shown is 3¾ ounces. It seems too obvious for further discussion that this table is not material to show variations in the one pound standard weight. Appellants on page 31 of their brief refer to this table but FAIL TO STATE THAT FACT.

We refer the court to plaintiffs' (appellants') Exhibit 2 (R., p. 160). Although the weights were not scaled to properly produce a standard weight loaf of bread these exhibits show the variations obtained by appellants themselves of *unwrapped* bread.

The first test of twelve loaves scaled at 27 oz. making it relevant to the 24 oz. standard weight shows a maximum variation of 3 oz. although the rules permit 4½ oz. for this weight (R., p. 29). The second table of Vienna Bread, unwrapped, is referrable to the one pound standard and shows a maximum variation of 2¾ oz. for the twelve hour period where 3 oz. is allowed (R., p. 29).

The third, "Tests June 29, 1927," at a weight in between the one pound and one and one-half pound standard show a variation of 2 oz. And see remaining tables on this page and the following one reaching the same conclusions (R., pp. 160-161).

And see plaintiffs' exhibit "K½" (R., p. 118). Plaintiffs' exhibit 2 (R., pp. 120 and 121).

The defendants (appellees) introduced tests and tables showing that these variations made by appellants and all within the permitted variation are unusual and not ordinarily experienced in the baking business. Defendants' exhibit No. 37 (R., pp. 262 and 263). Defendants' exhibit 1931-I (R., pp. 272-276, inc., with chart on p. 274 A).

A careful examination of the record and these exhibits will show that the evidence discloses, if anything, that appellants may reasonably comply with the rules and will have no difficulty in doing so.

Theirs is the burden of proof.

We respectfully urge that the evidence does not sustain a finding that the trial court erred in its finding of fact.

But if the court should find that the weight limitations prescribed by the Secretary of Agriculture may be examined and that compliance with them is impossible we further submit that although the rules be void, the statute is not affected thereby and remains a valid enactment and should be so held.

Point VI.

The business of the appellants is held on such reasonable conditions as may be imposed by the governing power of the state; and the fact that a reasonable exercise of the police power results in restrictions of appellants' business and imposes some inconveniences upon them does not render the law invalid.

Appellants in point 6 of their brief, pages 51-54, argue that in order to comply with the instant standard weight bread law they must (1) replace some of their equipment with another size, and (2) cease baking a 20 oz. loaf of bread.

The same argument has been so often urged and so often overruled that it would seem unnecessary to cite authorities to show its fallacy.

Every police regulation that can be conceived has for its purpose the restriction of the conduct on the part of some one or some class. If it were for that reason void a valid police regulation could not be drawn.

It was urged in *Schmidinger* v. *Chicago*, 226 U. S. 578, that there was a large demand for a size of bread not per-

mitted by the ordinance therein considered and that the bakeries had established a right to make that size bread in their business of which they could not be deprived. 226 U. S. 578, 586. The court held, 226 U. S. 578, 588:

> "It is further urged that this ordinance interferes with the freedom of contract guaranteed by the Fourteenth Amendment, for it is said that there is a demand for loaves of bread of sizes other than those fixed in the ordinance, which demand exists among many people and also among contractors whose business requires special sizes to be made for them. This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

It was urged that the cost of changing from old containers to a new size container rendered the North Dakota lard weight act invalid. *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 515. The court said not.

> "The testimony of the company was directed at great length to show the advantages of selling in containers over selling in bulk, and the expense to the company of the former and the additional expense which the law would require. And meeting the objection that the company fixed the price of the lard by the gross weight of the package, in other words, as though there were three pounds instead of two pounds six ounces,

it was replied that by so doing there was no profit to the company and only a reimbursement of the cost of the tin container and extra cost of putting up the lard in that style of package.

"But this does not justify the practice of the company nor establish the invalidity of the law of the State. The advantages are in a sense made a snare and the testimony means no more than that the packer has built up a trade on a system of gross weight which enables it to practice a kind of deception on the purchaser that he is getting three pounds of lard when he is only getting two pounds six ounces, and enables the packer to pay for the container. The evil of the transaction is not in the latter but in the former, that is, in the deception. The correction of the statute is that the lard and the container shall be unequivocally distinguished and the purchaser have the direct assurance of the quantity of lard he is receiving, knowledge of its price and the cost of the container to him, a means of estimating his purchase free from disguises or the necessity of an arithmetical estimate of what he is getting or paying for upon the market fluctuations of lard and tin. This may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, as the Supreme Court of the State observed, to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it."

It seems unnecessary to say more. Suffice it that the purpose of the act is to secure for the benefit of the public a system of honest weights and measures. An act for that purpose is concededly valid. The restrictions upon appel-

lants' business are necessary or useful to that end as we have shown, and the restriction, therefore, is a valid exercise of the police power.

That to comply with the law will result in some inconvenience and additional expense in appellants' business does not render the law invalid has been often held by this court.

Mugler v. *Kansas*, 123 U. S. 623, 31 L. Ed. 205.
Walls v. *Midland Carbon Co.*, 254 U. S. 300, 65 L. Ed. 276.
Erie Ry. Co. v. *Williams*, 233 U. S. 685, 58 L. Ed. 1155.
Northwestern Laundry v. *Des Moines*, 239 U. S. 486, 60 L. Ed. 396.
L'Hote v. *New Orleans*, 177 U. S. 587, 44 L. Ed. 899.
Crowley v. *Christensen*, 137 U. S. 86, 34 L. Ed. 620.
Schmidinger v. *Chicago*, *supra*.
Armour & Co. v. *North Dakota*, *supra*.

The statement on page 52 of appellants' brief represents the language of the Supreme Court of Nebraska in a very unfair manner. The court is not even referring to the objection by appellants that the act prohibits a twenty-ounce loaf of bread, but is presenting the reason that a maximum weight limit is necessary in fixing a standard weight to prevent weight frauds. This is clear upon reading the remaining part of the opinion to which appellants refer, but which they refrain from including in their quotation.

> "Plaintiffs urge that the act is unreasonable and arbitrary because it prohibits a maximum weight in each size of standard loaf. The very provision against

permitting excess of more than three ounces to the pound prevents short weight frauds. Neither the act itself nor the regulation prescribed by the secretary of agriculture requires wrapping, labelling or branding of loaves. Bakers may make as a pound loaf one perfectly legal but weighing 19 ounces and sell it as a substitute for the present twenty-ounce loaf which some of the plaintiffs greatly favor. It may or may not deceive the consumer accustomed to a twenty-ounce loaf. Whether it deceive him or not, no action will lie because the loaf is within the tolerance provided by the act. But if the baker make a loaf weighing 19½ ounces, a purchasing consumer may be actually and legally defrauded by believing it is one of the former twenty-ounce loaves. Or an undiscriminating purchaser may even be deceived into thinking it a pound and a half loaf. Thus, in a very practical way, it is demonstrated that the state attempts to prevent short weights by prohibiting excess tolerance or variation. That is the plain intent of the law."

Petersen Baking Co. v. *Bryan*, 124 Neb. 464, 469. 247 N. W. 39, 42.

CONCLUSION

Appellants submit:

1. That the act at bar and the rules of the Secretary of Agriculture presented are a valid exercise of the police power of the State of Nebraska and the judgment below should be affirmed.

2. If the court should hold that the maximum weight limit prescribed in the act is void then the court should (a) affirm the judgment below as to all parts of the act except the provision containing the maximum limit feature or (b) remand the case for determination by the Supreme

Court of Nebraska as to the separability of the two parts of the act.

3. If the court should hold that the rules of the Secretary of the Department of Agriculture are void, the judgment below should be affirmed in so far as it relates to the validity of the statute and reversed only as to the part sustaining the rules of the said Secretary.

Respectfully submitted,

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